In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1072

WILLIAM NICHOLAS KARCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 404 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1968. A petition for rehearing was denied on December 26, 1968. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to February 20, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the prosecutor in raising petitioner's right hand to bring to the attention of a witness at trial a ring the petitioner was wearing deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on a one-count indictment of post office robbery (18 U.S.C. 2114). On February 8, 1968, he was sentenced to seven years' imprisonment.

On September 22, 1967, Mrs. Loretta Colson, a clerk on duty at a contract post office located at a shopping center in Miami, Florida, was robbed of $233 by a gunman who showed her a gun inside his jacket (App. 2–4, 43).[1] She identified petitioner as the robber (App. 2). After the robbery, the police showed Mrs. Colson "at least one hundred" photographs and she selected one of petitioner as being a picture of the robber (App. 34). Four days later, she picked petitioner out of a group of approximately twenty-five college students exiting from a classroom, and, subsequently, in the presence of petitioner's counsel, picked petitioner out of a five man lineup. She testified she recognized him "immediately" (App. 35–37). A few minutes before the robbery, the maintenance superintendant of the shopping center had occasion to see petitioner in the vicinity of the post office (App. 63–64). After the robbery, the superintendent selected petitioner's picture out of a group of two hundred shown to him, and he later picked petitioner out of a four or five man lineup (App. 63–64, 78).

Approximately ten minutes after the robbery, petitioner arrived at his college class, ten minutes late

[1] "App." refers to the petitioner's appendix in the court of appeals which is on file with the Clerk of this Court.

(App. 91). The driving and parking time between the post office and the college was nine minutes (App. 173).

Mrs. Colson testified that the robber had worn on his right hand a ring with a large stone (App. 5). The prosecuting attorney then asked "Like this (raising defendant's right hand)?" (App. 6). This procedure was objected to on constitutional grounds (App. 6–14), as was a later prosecution request that petitioner hold up his hand (App. 14–33). The court instructed the jury to disregard these efforts (App. 14, 33–34), but thereafter permitted Mrs. Colson to state that at trial she recognized the ring petitioner wore on his right hand (App. 34).

ARGUMENT

Drawing Mrs. Colson's attention to the ring that petitioner was wearing at trial was not in derogation of petitioner's right against self-incrimination (see Pet. 2). At trial, without taking the witness stand, a defendant may be required to put on an article of clothing (*Holt* v. *United States,* 218 U.S. 245), to furnish his fingerprints (*United States ex rel. O'Halloran* v. *Rundle,* 384 F. 2d 997 (C.A. 3), certiorari denied, 393 U.S. 860), to stand (*Roberson* v. *United States,* 282 F. 2d 648 (C.A. 6), certiorari denied, 364 U.S. 879), and to display a facial scar (*Winiecki* v. *United States,* No. 1640, Misc., O.T. 1967, Certiorari denied, 392 U.S. 938). In the present case, the ring was merely an article of clothing which petitioner voluntarily chose to wear at this trial. Clothing items are neither testimonial nor communicative in nature.

Warden v. *Hayden,* 387 U.S. 294, 302–303; *Schmerber* v. *California,* 384 U.S. 757.

Since petitioner voluntarily wore the ring, the prosecutor's action in directing Mrs. Colson's attention to it did not constitute a search and seizure in violation of the Fourth Amendment (see Pet. 5). A ring worn by a defendant at a public trial is on public display and it is not a violation of that amendment for a witness to observe that which is readily apparent. *United States* v. *Lee,* 274 U.S. 559; *Harris* v. *United States,* 390 U.S. 234; cf. *Katz* v. *United States,* 389 U.S. 347; See *United States* v. *Richardson,* 388 F. 2d 842 (C.A. 6).

While the prosecutor's action in raising petitioner's hand to show the witness the ring instead of requesting petitioner to display it may have been inappropriate, it was hardly prejudicial. As this Court has noted in *Schmerber* v. *California,* 384 U.S. 757, 764 and in *United States* v. *Wade,* 388 U.S. 218, 223, both federal and state courts have usually held it is proper to compel submission to fingerprinting, photography, or measurements, or to require a defendant to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. See *Gilbert* v. *California,* 388 U.S. 263.

In any event, the identification of the ring was merely a corroborative detail. Petitioner had been positively identified as the robber by Mrs. Colson and support for her identification was given by the shopping center maintenance superintendent and by pe-

titioner's late arrival at class shortly after the robbery. Moreover, petitioner made affirmative use of his ring to show that Mrs. Colson was mistaken as to its color, and hence as to her identification of him (App. 176, 180, 181, 204, 209, 219, 270; Defense Exhibit 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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